**#S-10 signed 7-16-04**

**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE DISTRICT OF KANSAS**

| | |
|---|---|
| **In Re:** | |
| **ROBERT R. GILMORE,** | **CASE NO. 02-15992-7** |
| | **CHAPTER 7** |
| **DEBTOR.** | |
| **ROBERT S. GILMORE,** | |
| **PLAINTIFF,** | |
| **v.** | **ADV. NO. 03-5005** |
| **ROBERT R. GILMORE,** | |
| **DEFENDANT.** | |

**ORDER GRANTING IN PART AND DENYING IN PART**

**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

This proceeding is before the Court on the plaintiff's motion for summary judgment. The plaintiff appears by counsel Greg L. Bauer of Bauer, Pike, Pike & Johnson, Chtd., of Great Bend, Kansas. The defendant-debtor appears by counsel Paul R. Oller of Hays, Kansas. The Court has reviewed the relevant materials and is now ready to rule.

Under the federal Full Faith and Credit Statute,[1] the Plaintiff's state court judgment establishes that the Debtor owes him a debt for $99,750, and that the judgment was against the Debtor despite the fact the petition and the judgment named him with an incorrect middle initial. However, the judgment does not establish that the debt is based on fraud,

[1]28 U.S.C.A. § 1738.

defalcation while acting in a fiduciary capacity, embezzlement, larceny, or willful and malicious injury to the Plaintiff's property. Further proceedings will be required for the Plaintiff to establish any of these bases for the debt to be nondischargeable.

**FACTS**

In accordance with District of Kansas Local Bankruptcy Rule 7056.1(a), the Plaintiff's motion contains a numbered statement of facts with references to the portions of the record on which the Plaintiff relies. The Debtor's response does not (1) specifically controvert any of those facts, (2) contain a numbered statement of facts about which he contends a genuine issue exists, or (3) refer to any portions of the record. Therefore, the Court deems the Plaintiff's stated facts to be uncontroverted. With additions drawn from the Court's reading of the record, the facts are as follows.

The Plaintiff is the Debtor's son. At least as early as 2000, they were equal partners in and employed by Gilmore Tank Service, a two-person partnership. On April 2, 2002, the Plaintiff sued the Debtor in a Kansas state court for actions relating to the partnership. In relevant part, the Plaintiff made the following allegations:

> 4. That on or about January 15, 2002, the [Debtor] breached his duty to not only the partnership, but also the Plaintiff by wrongfully taking over all conduct of the partnership and excluding the Plaintiff from any involvement in the partnership business, including but not limited to termination or purporting to terminate the Plaintiff from employment by the partnership.
>
> 5. That the [Debtor] has failed and refused to provide the Plaintiff with partnership information, despite request, and has further made decisions detrimental to the partnership, including but not limited to the unilateral and wrongful termination of the Plaintiff from employment by the partnership and the hiring of third-parties who are not qualified for the positions for which they were employed.

6. That the actions of the [Debtor] have caused immediate and irreparable damage to the Plaintiff, including but not limited to the Plaintiff's loss of income from the partnership business, together with Plaintiff's loss of employment.

7. That the [Debtor's] actions have also damaged the business of the partnership and ultimately diminished the value of the Plaintiff's undivided ½ interest in said partnership.

The Plaintiff sought relief in four counts, only two of which are relevant to this proceeding. Each consisted of a single paragraph. They read:

COUNT I

8. That Plaintiff prays for judgment against the [Debtor] in an amount in excess of Seventy-five Thousand Dollars ($75,000.00) for the [Debtor's] breach of his fiduciary duties pursuant to K.S.A. 56(a)-404 to not only the Plaintiff, but also the partnership of which the Plaintiff is an undivided 50% owner.

. . . .

COUNT IV

11. That the actions of the [Debtor] incident to his unilateral and wrongful takeover of the partnership and the exclusion of the Plaintiff from the benefits of the partnership were intentional and malicious designed to cause irreparable economic damage to the Plaintiff, and Plaintiff requests judgment in an amount in excess of Seventy-five Thousand Dollars ($75,000.00) the damages incurred as a result of the [Debtor's] unilateral malicious, wrongful and improper actions.

The petition incorrectly showed the Debtor's middle initial to be "L," not "R."

A summons and a copy of the petition were served on the Debtor, but instead of filing an answer, he returned the documents to the state court with a note that they were delivered to his house but had the wrong name on them. The Plaintiff's attorney sent the

Debtor a letter by certified mail, advising him that despite the mistaken middle initial, he would ignore the suit at his own peril. The letter was returned unclaimed.

On June 10, 2002, the Plaintiff filed a motion for default judgment, asking for $99,750 on Count 1 and the same amount on Count 4. The motion did not add any information to the allegations quoted above. The Plaintiff sent copies of the motion to the Debtor by certified mail at two addresses, but both mailings were returned unclaimed. About a month later, on July 9, the state court granted the motion. Other than referring to the counts in the petition, the default judgment did not explain what the damage awards were based on. Nothing in the record before this Court indicates how the damage amounts were calculated.

Later that month, the Plaintiff applied for an order requiring the Debtor to appear before the state court to be questioned about his property to help the Plaintiff collect the judgment. The application said the judgment was for $99,750, so the Plaintiff apparently recognizes that the damages awarded on Counts 1 and 4 are redundant. The state court entered an order for the examination to take place on August 21. According to the sheriff's return, a sheriff's deputy tried to serve the order on the Debtor on August 9, but the Debtor refused to take the papers because "that was not his name." The Debtor did not appear for the examination, and on the Plaintiff's motion, the state court ordered the Debtor to appear on September 18 to show cause why he should not be held in contempt for failing to appear.

The show cause hearing was apparently continued, because it actually took place on October 16. The Debtor appeared in person and by counsel. The state court found the Debtor to be the person against whom the judgment had been entered and held him in contempt for failing to appear for the examination. The court said:

> Robert R. Gilmore contends at this point that no judgment was obtained against him and that he cannot be held in contempt of court because his middle initial is R and not L. And that the person identified in the pleadings is not him.
>
> The context of the pleadings and the behavior of Mr. Robert R. Gilmore clearly indicates he is the person contemplated by the petition and the person contemplated by the journal entry. The court therefore finds that his failure to appear is based upon the frivolous reason that the middle initial is incorrect, and the court finds him to be in contempt of court for failing to appear for an examination.

The court then ordered the Debtor to be held in custody until he purged himself of contempt by agreeing to the examination the Plaintiff had sought, but stayed the order for ten days so the Debtor could file an appeal. The Debtor did file a notice of appeal within ten days of the hearing, but took no further action to pursue his appeal.

On November 13, the Plaintiff filed a motion asking the state court to order the Debtor to turn over to the Plaintiff all the partnership property he had and all income derived from use of that property since the first of the year. On the day the motion was scheduled to be heard, November 27, 2002, the Debtor filed his voluntary Chapter 7 bankruptcy petition, and filed a suggestion of bankruptcy with the state court. In his bankruptcy schedules, the Debtor listed the amount of the Plaintiff's judgment as $99,750.

Later, the Plaintiff commenced this adversary proceeding, claiming that his judgment against the Debtor is excepted from discharge by 11 U.S.C.A. § 523(a)(2), (4),

and (6). The Plaintiff now seeks summary judgment under all three provisions, based on the materials he has submitted from the state court record. The Debtor's response is almost entirely a repetition of his assertion that the state court judgment is not against him because of the mistaken middle initial, but does add at the end that this Court should determine the issues about fraud and breach of fiduciary duty.

**DISCUSSION**

*1. The Full Faith and Credit Statute*

The Plaintiff contends that the dischargeability of his claim against the Debtor is established through the collateral estoppel, or issue preclusion, effect of the default judgment that the state court entered in his favor. The federal Full Faith and Credit Statute[2] requires the Court to apply the collateral estoppel law of Kansas, the state in which the judgment was rendered, to determine the judgment's effect in this case.[3] But if Kansas law says that the judgment would have a preclusive effect here, the Court must then determine whether something else in federal law makes an exception to the Full Faith and Credit Statute for purposes of the Plaintiff's claims.[4]

*2. Kansas Law of Collateral Estoppel, or Issue Preclusion*

---

[2]28 U.S.C.A. § 1738.

[3]*Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 379-86 (1985); *Matsushita Electric Industrial Co., Ltd., v. Epstein*, 516 U.S. 367, 373-75 (1996).

[4]*Marresse*, 470 U.S. at 379-86; *see also National Union Fire Ins. Co. v. Boyovich (In re Boyovich)*, 126 B.R. 348, 350 (Bankr. W.D. Wash. 1991) (*Marresse* approach applies in bankruptcy proceedings).

Under Kansas law,

> The requirements of collateral estoppel are: (1) a prior judgment on the merits which determined the rights and liabilities of the parties on the issue based upon the ultimate facts as disclosed by the pleadings and judgment; (2) the parties must be the same or in privity; and (3) the issue litigated must have been determined and necessary to support the judgment. [Citation omitted.][5]

Two preliminary questions arise from a cursory consideration of these requirements and the facts of this case: (1) whether a default judgment qualifies as a judgment on the merits, and (2) whether the mistaken middle initial in the pleadings and original judgment means the parties involved in the state court lawsuit were not the same, despite the state court's determination at the show cause hearing that the Debtor was the person named in the pleadings.

*a. Default judgment*

The Kansas state appellate courts have held that a default judgment does qualify as a judgment on the merits for preclusion purposes. In *Dennis v. Southeastern Kansas Gas Company*, the Kansas Supreme Court ruled that a default judgment obtained by a city declaring that a gas company had to indemnify it for any damages it might be ordered to pay to the plaintiffs was binding on the plaintiffs, who had settled their claims against the gas company and agreed to indemnify the company for any damages it might be ordered to pay to the city.[6] In *Banister v. Carnes*, the Kansas Court of Appeals held that a dentist's default judgment for his fees barred his patient's claim for malpractice based on the services that

---

[5]*Regency Park v. City of Topeka*, 267 Kan. 465, 478 (1999).

[6]227 Kan. 872, 878-80 (1980).

were also the basis for the fees because the malpractice claim was a compulsory counterclaim to the suit for fees, and the patient could not collaterally attack the default judgment.[7] So this Court must treat the state court judgment as a judgment on the merits even though it was granted by default.[8]

The Court notes that *Collier on Bankruptcy*, a leading bankruptcy treatise, contends that in dischargeability proceedings under § 523(a)(2), (4), (6), and (15), bankruptcy courts should not give preclusive effect to state court default judgments against debtors, even if the applicable state's collateral estoppel law would do so.[9] The reason the treatise gives for this contention is "the strong federal policy of assuring that exceptions to discharge under [these provisions] not be entered based upon a default by the debtor in a nonbankruptcy court, which is evidenced by the exclusive jurisdiction given to the bankruptcy courts to decide those matters."[10] The Court is convinced that the Supreme Court foreclosed such an argument in *Marrese v. American Academy of Orthopaedic Surgeons*.[11]

Even though the subsequent lawsuit in *Marrese* involved federal antitrust claims within the exclusive jurisdiction of the federal courts, the Supreme Court ruled that the

---

[7]9 Kan. App. 2d 133, 135-38 (1983).

[8]*See Harris v. Byard (In re Byard)*, 47 B.R. 700, 706 (Bankr. M.D. Tenn. 1985) (similarly concluding that Kansas law gives default judgments collateral estoppel effect).

[9]4 *Collier on Bankruptcy*, ¶523.06 at 523-21 to -22 (Resnick & Sommer, eds.-in-chief, 15th ed. rev. 2004).

[10]*Id*. at 523-22.

[11]470 U.S. 373.

prior state court judgment could have a preclusive effect in the later lawsuit, and would have the preclusive effect established by the law of the state where the judgment was rendered unless a later statute governing the federal claims contained an express or implied repeal of the Full Faith and Credit Statute.[12] The only authority *Collier* cites to support its federal policy claim is *Brown v. Felsen*.[13] But as indicated in a footnote in *Brown*, that case concerned res judicata, or claim preclusion, not the narrower principle of collateral estoppel, or issue preclusion; the Court said a state court determination of factual issues under standards identical to the dischargeability standards contained in the Bankruptcy Code could bar relitigation of those issues in the bankruptcy court.[14]

An example of an implied repeal of the Full Faith and Credit Statute appears in § 523(a)(5)(B) of the Bankruptcy Code, which declares that a liability "designated as alimony, maintenance, or support" that has been imposed by a state court is not excepted from discharge unless it "is actually in the nature of alimony, maintenance, or support."[15] In other words, the label the state court judgment placed on the liability does not preclude litigating in bankruptcy court the true nature of the liability. Sections 523(a)(2), (4), and (6), by contrast, contain no similar restrictions on the effect a state court judgment can have on proceedings under their provisions.

---

[12]470 U.S. at 379-82.

[13]442 U.S. 127 (1979).

[14]442 U.S. at 139 n. 10.

[15]11 U.S.C.A. § 523(a)(5)(B).

Under Kansas law, then, the Plaintiff's default judgment is entitled to at least some preclusive effect here. At a minimum, it establishes that the Debtor owes the Plaintiff a debt and the amount of that debt is $99,750. The Court is aware of nothing in the Bankruptcy Code or other federal law that would alter this impact of the Full Faith and Credit Statute in this case. So the Debtor cannot now dispute these consequences of his actions with respect to the partnership and the Plaintiff.

*b. Misnomer defense*

Unlike the original judgment by default, the state court's ruling that the judgment was against the Debtor despite the mistaken middle initial was entered after the Debtor appeared before the court and presented his evidence and arguments about the effect of the mistake. Clearly this ruling satisfied the Kansas requirements for collateral estoppel. It decided on the merits that the Debtor's reliance on the mistake was unavailing. The Plaintiff and the Debtor were the parties before the state court litigating that issue. To determine that the default judgment was binding on the Debtor, the state court had to determine the effect of the mistake and had to resolve the issue against the Debtor in order to find him in contempt. If the Debtor wanted to dispute that ruling, he needed to pursue an appeal of it. The Court is aware of nothing in federal law that could make an exception to the Full Faith and Credit Statute for purposes of the Debtor's misnomer defense, so he is barred from relitigating that issue here.

*3. Bases of the Debtor's Liability to the Plaintiff under the State Court Judgment*

As indicated above, the state court awarded the Plaintiff a single money judgment of $99,750 on the alternative bases stated in Counts I and IV of his state court complaint. In *Turney v. O'Toole*,[16] the Tenth Circuit declared that when there were two grounds for a prior judgment, neither of them was entitled to preclusive effect because neither should be considered to have been necessary for the judgment. The Circuit supported this ruling by citing a series of comments to § 27 of the *Restatement (Second) of Judgments.* The explanation that seems most pertinent to the ruling appears in comment i:

> *i. Alternative determinations by court of first instance*. If a judgment of a court of first instance is based on determination of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone. [Cross-references omitted.]
>
> It might be argued that the judgment should be conclusive with respect to both issues. The matter has presumably been fully litigated and fairly decided; the determination does support, and is in itself sufficient to support, the judgment for the prevailing party; and the losing party is in a position to seek reversal of the determination from an appellate court. Moreover, a party who would otherwise urge several matters in support of a particular result may be deterred from doing so if a judgment resting on alternative determinations does not effectively preclude relitigation of particular issues.
>
> . . . . First, a determination in the alternative may not have been as carefully or rigorously considered as it would have if it had been necessary to the result, and in that sense it has some of the characteristics of dicta. Second, and of critical importance, the losing party, although entitled to appeal from both determinations, might be dissuaded from doing so because of the likelihood that at least one of them would be upheld and the other not even reached. If he were to appeal solely for the purpose of avoiding the application of the rule of issue preclusion, then the rule might be responsible for increasing the burdens of litigation on the parties and the courts rather than lightening those burdens. . . .[17]

---

[16]898 F.2d 1470, 1472 n. 1 (10th Cir. 1990).

[17]Restatement (Second) of Judgments, § 27, comment i (1982).

The Tenth Circuit Bankruptcy Appellate Panel expressed a similar view in *Cobb v. Lewis (In re Lewis).*[18] Lewis was an attorney who had been indefinitely suspended by the Kansas Supreme Court based on eight different disciplinary complaints accusing him of violating the Kansas Rules of Professional Conduct.[19] One of the eight complaints led to a finding, pursuant to KRPC 8.4(c), that Lewis had engaged "in conduct involving dishonesty, fraud, deceit or misrepresentation" with respect to certain clients.[20] In those clients' dischargeability proceeding in Lewis's subsequent Chapter 7 bankruptcy case, the bankruptcy court concluded the Kansas Supreme Court's decision "established all of the elements of § 523(a)(2)(A)," including that Lewis had made false representations to the clients with the intent to deceive them, so collateral estoppel precluded Lewis from litigating the dischargeability of their malpractice judgment against him.[21] The Bankruptcy Appellate Panel reversed, first concluding that Lewis had no incentive to fully litigate the issue of his intent in making allegedly false representations to these clients because an adverse ruling on any one of the other seven complaints could have resulted in his suspension.[22] The BAP then considered whether the disciplinary judgment should be

---

[18]271 B.R. 877, 882-87 (10th Cir. BAP 2002).

[19]The court's decision is published at 266 Kan. 766 (1998). The current Kansas Code of Professional Conduct is found at 2003 Kan. Ct. R. Annot. Rule 226, pp. 317-480.

[20]See 265 Kan. at 775. Rule 8.4(c) can be found at 2003 Kan. Ct. R. Annot. at 464; its language has not changed since the events in *Lewis* took place.

[21]271 B.R. at 885-86.

[22]271 B.R. at 884.

binding under Kansas collateral estoppel law, and concluded that the finding that Lewis had violated Rule 8.4(c) by acting with dishonesty or intent to deceive was not necessary or essential to the judgment, which included numerous charges and numerous findings on the eight complaints, so the finding about Lewis's intent to deceive those clients did not satisfy the requirements of collateral estoppel under Kansas law.[23] In *Robinson v. Volkswagenwerk AG*, [24] employing a similar legal analysis, the Tenth Circuit concluded that collateral estoppel precluded the assertion of claims in a suit where a jury in earlier litigation had necessarily found at least one of three facts, and the claims asserted in the later suit would have required contrary findings on all three facts.

The Court has found no Kansas state cases addressing this point, but the Tenth Circuit's approach is based on the requirement that a ruling be necessary to a judgment to have issue preclusive effect, and that requirement is included in Kansas state case law. The Court concludes that Kansas courts would follow the Tenth Circuit's approach. In the context of this case, the Court interprets *Turney*, *Lewis*, and *Robinson* to mean that the Plaintiff's judgment should not be given preclusive effect here unless each of its two legal bases (that is, the one contained in Count I and the one contained in Count IV), standing alone, would satisfy the requirements of either § 523(a)(2), (4), or (6).[25] In making this

---

[23]271 B.R. at 884-87.

[24]56 F.3d 1268, 1272-73 (10th Cir. 1995), *cert. denied* 516 U.S. 1045 (1996).

[25]*See* 18 Wright, Miller, & Cooper, *Fed. Prac. & Pro.: Jurisdiction 2d*, § 4421 at 574-75 (2002) (suggesting this approach to issue preclusive effect of judgments based on alternative grounds).

analysis, the Court will bear in mind that the Plaintiff's state court complaint contains the only explanation of the bases of the judgment the state court entered.

*a. Fraud or misrepresentation under § 523(a)(2)*

Section 523(a)(2) of the Bankruptcy Code excepts from discharge any debt "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by — (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's . . . financial condition; [or] (B) use of a statement in writing . . . (ii) respecting the debtor's . . . financial condition." The Plaintiff has not specified whether he is relying on subsection (A) or (B) of this provision, but nothing in the preliminary allegations, Count I, or Count IV of his state court complaint mention a written statement concerning the Debtor's financial condition, so the Court can reject out of hand any claim that subsection (B) applies here.

Similarly, the Plaintiff has not specifically identified anything in his state court allegations about the Debtor's actions that he contends constituted false pretenses, a false representation, or actual fraud. In order to succeed under § 523(a)(2)(A), the Plaintiff

> must prove the following elements by a preponderance of the evidence: 1) the debtor knowingly committed actual fraud or false pretenses, or made a false representation or willful misrepresentation; 2) the debtor had the intent to deceive the creditor; and 3) the creditor relied on the debtor's representation. *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1373 (10th Cir.1996). The creditor's reliance must have been justifiable, *Field v. Mans*, 516 U.S. 59, 74-75 (1995), and the creditor must have been damaged as a result, *Young*, 91 F.3d at 1373.[26]

[26]*State of Missouri ex rel. Nixon v. Audley (In re Audley)*, 275 B.R. 383, 388 (10th Cir. BAP 2002).

The Court sees nothing in the preliminary allegations, Count I, or Count IV of the Plaintiff's state court petition that would seem to qualify as an allegation that the Debtor did anything fraudulent, made any misrepresentation, or otherwise acted by trickery or deceit.[27] Certainly the Plaintiff claimed that the Debtor acted wrongfully. He did not suggest that the Debtor defrauded, misled, or tricked him in any way.

Consequently, the Court concludes that the Plaintiff's state court judgment did not establish the elements required to except the judgment from the Debtor's discharge under § 523(a)(2)(A) or (B).

*b. Fiduciary defalcation, embezzlement, or theft under § 523(a)(4)*

Section 523(a)(4) of the Bankruptcy Code excepts from discharge any debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." The Tenth Circuit has construed the fiduciary defalcation portion of this provision narrowly. In *Fowler Brothers v. Young (In re Young)*,[28] the Circuit said:

> The existence of a fiduciary relationship under § 523(a)(4) is determined under federal law. However, state law is relevant to this inquiry. Under this circuit's federal bankruptcy case law, to find that a fiduciary relationship existed under § 523(a)(4), the court must find that the money or property on which the debt at issue was based was entrusted to the debtor. Thus, an express or technical trust must be present for a fiduciary relationship to exist under § 523(a)(4). Neither a general fiduciary duty of confidence, trust, loyalty, and good faith, nor an inequality between the parties' knowledge or

---

[27]*See* 4 *Collier on Bankruptcy*, ¶ 523.08[1][e] at 523-45 ("Actual fraud . . . consists of any deceit, artifice, trick, or design involving direct and active operation of the mind, used to circumvent and cheat another — something said, done or omitted with the design of perpetrating what is known to be a cheat or deception").

[28]91 F.3d 1367, 1371-72 (10th Cir. 1996).

> bargaining power, is sufficient to establish a fiduciary relationship for purposes of dischargeability. Further, the fiduciary relationship must be shown to exist prior to the creation of the debt in controversy.[29]

Although the Plaintiff has failed to tie any specific state court allegations to his claim under § 523(a)(4), in Count I of his state court petition, he did mention "fiduciary duties" and cite K.S.A. 2003 Supp. 56a-404. That statute provides:

> **General Standards of partner's conduct**
>
> (a) The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subsections (b) and (c).
>
> (b) A partner's duty of loyalty to the partnership and the other partners is limited to the following:
>
> (1) To account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity;
>
> (2) to refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership; and
>
> (3) to refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.
>
> (c) A partner's duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

---

[29]91 F.3d at 1371-1372 (citations and internal quotation marks omitted).

The duty under 56a-404(b)(1) to hold partnership property as trustee for the partnership might constitute the express or technical trust referred to in *Young*. Otherwise, the Court believes the fiduciary duties that 56a-404 imposes on a partner in a Kansas partnership are the kind of "general fiduciary duty of confidence, trust, loyalty, and good faith" that the Tenth Circuit meant was not sufficient to constitute a fiduciary relationship covered by § 523(a)(4).[30]

Count I of the Plaintiff's state court petition mentions "fiduciary duties" and refers generally to 56a-404, but neither it nor the preliminary allegations suggest that the Debtor had failed to hold partnership property as a trustee as required by 56a-404(b)(1). The Court is convinced that Count I does not describe the Debtor's actions in terms covered by the fiduciary defalcation portion of § 523(a)(4), as interpreted in *Young*.

Count IV of the Plaintiff's state court complaint does not mention any fiduciary duty. That count's allegations do suggest that the Plaintiff believed the Debtor had violated 56a-404(c) through intentional misconduct by excluding him from the partnership, but not that the Debtor had failed to hold partnership property as a trustee under 56a-404(b)(1). So, like Count I, Count IV does not allege a fiduciary defalcation under the limited fiduciary capacity to which the Tenth Circuit has restricted § 523(a)(4).

Embezzlement does not require a fiduciary relationship. The Tenth Circuit has said for purposes of § 523(a)(4), "[E]mbezzlement is defined under federal common law as 'the

---

[30]*Cf. Holaday v. Seay (In re Seay)*, 215 B.R. 780, 785-87 (10th Cir. BAP 1997) (fiduciary duty Oklahoma law imposed on members of partnership or joint venture did not constitute fiduciary relationship covered by §523(a)(4)).

fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come.'"[31] The Court understands "fraudulent appropriation" to mean that the person used the property for purposes other than those for which it was placed in his or her control or possession.[32] Although the Plaintiff clearly alleged that the Debtor wrongfully took over the partnership and excluded him from it, the Plaintiff did not allege in either Count I or Count IV that the Debtor used partnership property for purposes other than those of the partnership. The allegation that the Debtor hired unqualified people to perform partnership work suggests an improper action, but would have nothing to do with any possible embezzlement of partnership property.

Larceny is the same as embezzlement except that the thief never had permission to take possession of the property involved, or otherwise obtained it unlawfully.[33] Neither of the Plaintiff's counts alleged that the Debtor improperly took possession of the Plaintiff's separate property, only that he improperly excluded the Plaintiff from the partnership and its property. As one of the general partners, the Debtor certainly had authority to possess partnership property. Any fraudulent appropriation he committed would have to have been embezzlement, not larceny.

---

[31]*Klemens v. Wallace (In re Wallace)*, 840 F.2d 762, 765 (10th Cir. 1988) (quoting *Great American Ins. Co. v. Graziano (In re Graziano)*, 35 B.R. 589, 594 (Bankr.E.D.N.Y. 1983), which was quoting *Gribble v. Carlton (In re Carlton)*, 26 B.R. 202, 205 (Bankr.M.D.Tenn. 1982)).

[32]*See* 4 *Collier on Bankruptcy*, ¶ 523.10[2].

[33]*See* 4 *Collier on Bankruptcy*, ¶ 523.10[2].

For these reasons, the Court concludes that neither Count I nor Count IV of the Plaintiff's state court petition supplies a basis for an exception to discharge under § 523(a)(4).

*c. Willful and malicious injury under § 523(a)(6)*

Section 523(a)(6) of the Bankruptcy Code excepts from discharge any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." In *Kawaauhau v. Geiger*, the Supreme Court ruled that this provision applies only to a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury.[34] The Court explained that this means the debtor must have intended the consequences of the act he or she performed, not simply the act itself.[35] Nothing in the general allegations or in Count I of the state court petition seems to suggest that the Debtor acted with the intent to injure the Plaintiff. By saying in Count IV that the Debtor's actions were "designed to cause irreparable damage to the Plaintiff," the Plaintiff may have suggested that the Debtor acted with the intent to harm him. But that allegation does not foreclose the possibility that the Debtor might have believed, mistakenly and therefore still wrongfully, that he was acting in the partnership's interest and subjectively intended only to help the partnership, although he "designed" his actions in such a way that they would also damage the Plaintiff. The Court is convinced that the preliminary allegations, Count I, and

[34]523 U.S. 57, 60-64 (1998).

[35]523 U.S. at 61-62.

Count IV of the Plaintiff's state court petition are not sufficient to establish that the Debtor's obligation to him arose from circumstances covered by § 523(a)(6).

*d. Federal policy exception to issue preclusion*

Having determined that the Plaintiff's judgment does not preclude the Debtor from litigating before this Court whether his debt to the Plaintiff is excepted from discharge by § 523(a)(2), (4), or (6), the Court need not consider whether Congress has expressly or impliedly repealed the Full Faith and Credit Statute for purposes of those provisions.

**CONCLUSION**

For these reasons, the Court concludes that the state court's ruling rejecting the Debtor's misnomer defense establishes, through issue preclusion, that the judgment is effective against him. The Debtor is barred from pursuing that defense before this Court. The judgment also establishes that the Debtor owes the Plaintiff a debt for $99,750. However, the Plaintiff's state court judgment does not establish that the Debtor's obligation to pay him money damages is excepted from discharge under 11 U.S.C.A. § 523(a)(2), (4), or (6). Further proceedings will be necessary before the Court can determine whether the debt is nondischargeable.

**IT IS SO ORDERED.**

Dated this _____ day of July, 2004.

_____

DALE L. SOMERS
BANKRUPTCY JUDGE

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that true and correct copies of the above **ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT x** were mailed via regular U.S. mail, postage prepaid, on the _____ day of July, 2004, to the following:

Greg L. Bauer
Attorney at Law
P.O. Box 1349
Great Bend, KS 67530
*Attorney for Plaintiff*

Paul R. Oller
114 W 11th Street
Hays, KS 67601
*Attorney for Debtor/Defendant*

_____
Vicki D. Jacobsen
Judicial Assistant